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Anne Klinefelter

University of North Carolina School of Law, klinefel@email.unc.edu

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copyright corner

States Begin to Adopt UCITA – Model Legislation for Licensing

The state of Virginia recently became the first state to adopt UCITA, the Uniform Computer Information Transactions Act, the licensing law opposed by SLA, other library organizations, and various other groups and businesses who find the law overreaching and disadvantageous to consumers.

In the December 1999, Copyright Corner column, Sally Wiant reviewed the history of UCITA and the controversy surrounding it.¹ Since that time a number of states have considered UCITA legislation, though the results are not the uniform result intended for model legislation.

Virginia pursued adoption of the Act soon after the National Conference of Commissioners on Uniform Laws voted to release the controversial draft for consideration by the states in late July of 1999. Although the Virginia UCITA bill was signed into law on March 15, 2000, the provisions of the law left room for some modifications before it would become effective. The effective date of the legislation was postponed until July 1, 2001, and the Joint Commission on Technology and Science was required to appoint an advisory committee to review the legislation and prepare a report that might include proposed amendments by December 1, 2000.

While Virginia may be the first state to pass UCITA, Maryland has claimed the front place as the first state in which UCITA will take effect. On April 10, 2000, both houses in Maryland passed UCITA

bills and managed to work out the differences in their versions. Significantly, however, the legislation was passed with amendments. The conference committee working out the differences between house and senate versions decided that a state judge would determine which state's law would control in the event of any disagreements about the license. Somewhat like Virginia's provisions for an advisory committee report, Maryland's law retained senate language that creates a legislative oversight commission to study the act and recommend revisions.

Oklahoma may soon follow the lead of Virginia and Maryland. In March of 2000, the Oklahoma senate passed an amended version of the uniform law and forwarded to the house where it was reported out favorably with amendments by the House committee.

UCITA legislation has been introduced in other states as well. Delaware, Hawaii, Illinois, Iowa, and Maine have seen some introduction of legislation to adopt this uniform law. Opposition in some of these states has dampened enthusiasm for enactment. Maine's Legislative Counsel has rejected their bill, and Illinois has tabled the legislation. Hawaii and Iowa have considered the legislation but have not moved ahead on it.

SLA has joined others to form a coalition called 4CITE (For A Competitive Information and Technology Economy). While libraries have accepted licenses as a part of acquiring access to electronic products, the terms of those licenses and the law surrounding those contracts could make the acquisition and maintenance of electronic products quite a burden. Criticism

of UCITA has included its expansion of producers' rights at the expense of consumers' rights.

One problem librarians have with UCITA is that it validates "shrink-wrap" or click-on licenses that give the purchaser no room to negotiate. The terms of the contract in such situations are not available for review until after purchase. If the library finds the terms unacceptable because, for example, they do not allow for interlibrary loan of a portion of information from the product or they name a distant state as the controlling law for the contract, the library's only option is to return the product for a refund. Presumably, the library is pays for shipping charges both ways.

Another criticism of UCITA is that it allows contracts to prohibit transfer of software from one purchaser to another, even in the course of a merger or acquisition. If a law firm library acquired an electronic product under UCITA, and the firm were to split or rename itself, these non-transferability terms could prevent further use of the product since the entity to which it was licensed no longer exists. This provision underscores the divergence of licensing from copyright models of balancing the rights of creators and users. Under copyright, the first sale doctrine, codified at 17 U.S.C. §109, allows a purchaser to lend, resell or give away her copy of copyrighted material. Licensing destroys this right by denying ownership of the copy to the purchaser, offering only the purchase of certain described uses. Non-transferability clauses reveal the contrast between the federal copyright model and the UCITA licensing model.

Other concerns include the allowance of remote disabling of software on the purchaser's own computer in the case of a disagreement and the broad definition of

information and scope of UCITA. Remote disabling, termed "self-help," is criticized as giving the producer too much control before a disagreement has been resolved in a legal forum. The broad definition of information means that material legally available as government documents or public domain may soon become restricted simply because it is offered as a computer file.

Many of the supporters of UCITA software producers, businesses and computer-related companies such as Microsoft and America Online who seek uniform licensing laws that favor mass-market distribution of electronic information. There are also powerful opponents that criticize UCITA through 4CITE such as include library associations, businesses and other organizations. Businesses that have signed on include Caterpillar Inc., Circuit City Stores Inc., John Hancock Mutual Life Insurance Company, McLane Company Inc., Prudential Insurance Company of America, Reynolds Metal Corporation, Principal Financial Group, and Walgreens. A number of organizations of computer professionals have also joined forces with 4CITE such as the American Committee for Interoperable Systems, the Computer & Communications Industry Association, Computer Professionals for Social Responsibility, Digital Future Coalition, the Electronic Frontier Foundation, the International Communications Association, and the Society for Information Management. Others objecting to UCITA through 4CITE are the Conference on College Composition and Communication, Infoworld, the National Consumer Law Center, and the National Humanities Alliance.

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To learn more about SLA's 4CITE efforts to prevent adoption of UCITA see <http://www.4cite.org>. The official NCCUSL archive with the full 114 page UCITA text is available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm. Carol Kunz, an attorney in California, maintains a web page on UCITA including links to state bills at <http://www.ucitaonline.com/>.

1. Sarah K. Wiant, UCITA Passes—Model Legislation on its Way to the States @ Information Outlook, December 1999, pp 44, 46.

by Anne Kleinfeiter, Assistant Director for Research, Instruction and Access and Associate Clinical Professor of Law, University of North Carolina-Chapel Hill. She may be reached at klinefel@email.unc.edu.

For more information,
contact Laura Gasaway
(laura_gasaway@unc.edu).